IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AKEEL A. NESBITT, Appellant.	No. 36993-1-II UNPUBLISHED OPINION

Penoyar, J. — Akeel Nesbitt appeals his accomplice to first degree robbery and accomplice to assault convictions. Nesbitt argues ineffective assistance of counsel because his attorney failed to object to evidence and to witnesses' testimony that they were testifying "truthfully" under their plea agreements. Nesbitt also argues that the trial court improperly excluded evidence of motive for one witness and evidence of past criminal behavior for another. His claims have no merit and we affirm his convictions.

FACTS

I. The Robbery

On October 10, 2006, James Jones, owner of True Services custodial services (TS) was robbed of his wallet at knifepoint in his store. Nesbitt was present during the robbery. Nesbitt was not a TS employee but had worked occasional odd jobs for Jones in the past. Nesbitt regularly went to TS looking for work.

On the day of the robbery, Nesbitt came into TS and sat on the couch in the lobby. Shortly, thereafter, three men came in looking for work. Charmie Walker, the office manager, handed them applications. Two of them filled out employment applications, while the third man

sat down in the lobby. The men left after the two finished filling out the applications. Shortly thereafter, Nesbitt exited TS and smoked a cigarette just outside the business's main door. After smoking the cigarette, Nesbitt returned to the couch in the lobby.

After a short while, the three men came back into TS. The man who had not filled out an application asked Walker where the restroom was; the other two men walked toward Jones's office. Walker got up to show the man where the restroom was, but as she did, he sprayed her in the face with mace. Walker screamed and backed away but the man who sprayed her followed. Nesbitt got off the couch and yelled for the man to "get off of her" and "[d]on't shoot her." Report of Proceedings (RP) at 761.

Hearing Walker scream, Jones picked up the phone to dial 911. As he did this, one of the two men who came back to his office grabbed the phone and pulled it from the wall. Jones fell over because "[the intruder] wasn't nice" and Jones cut his hand on the man's knife as he fell. RP at 127. Jones could not get up after falling.[1] Once Jones was on the ground, the man who had caused Jones to fall told him to "[g]ive me your money." RP at 128. At that point the men took Jones's wallet out of his pocket and fled.

After the men ran out of the building, Nesbitt helped Jones up off of the floor. Nesbitt then called the police, who arrived shortly thereafter. Police interviewed Walker, Jones, and Nesbitt about the incident. Jones's wallet contained $11 and some credit cards.

Several weeks after the robbery, Nesbitt returned to TS to speak with Jones about information he had regarding someone who had been using Jones's gas card. Nesbitt told Walker

[1] Jones was almost 85 years old.

that someone named "Bobby" had been involved in the robbery and had been using Jones's gas card. RP at 767. Nesbitt had Jones's gas card and said he had found it at a gas station. Jones believed that Nesbitt wanted to be paid for the information. Nesbitt returned again, this time with someone else that knew who was involved in the robbery. Jones was not in, so the person left a note for him. Nesbitt wanted Jones to pay for the information.

II. The Investigation

The police investigation eventually led to a man named Bobby Johnson. Police interviewed Johnson at the Kitsap County Jail where he was in custody. Johnson confessed to participating in the robbery at TS and implicated several other men, including Nesbitt.

After a continuing investigation, the State charged Nesbitt with one count of accomplice to first degree robbery with a deadly weapon and two counts of accomplice to second degree assault. The state charged three other men in connection with the TS robbery, including Johnson, Shawn Wells, and James Waymire. Waymire and Johnson pleaded guilty and agreed to testify on the State's behalf against Nesbitt and Wells at trial.

III. Trial

At trial, Johnson and Waymire testified that Nesbitt had been the "mastermind" behind the TS robbery. Appellant's Br. at 4. Both testified that Nesbitt suggested the robbery of TS because there were only two people at the office, and because the owner, Jones, always had a lot of cash on hand. Both testified that Nesbitt's part in the robbery was to pretend to be a victim/witness and to give the police false information about the assailants. According to their plea agreement terms, Johnson and Waymire were to cooperate with the police and prosecutor

and to testify "truthfully." RP at 373, 573.

Additionally the State called Michael Singer as a witness. Singer was a "jailhouse informant" who testified that Nesbitt told him he was in jail for the TS robbery and that he had "masterminded" the crime. RP at 730. Jones and Walker, as well as police and detectives, all testified for the State.

The jury found Nesbitt guilty of accomplice to first degree robbery and guilty of accomplice to second degree assault on Walker. Nesbitt appeals.

ANALYSIS

I. Ineffective Assistance of Counsel

Nesbitt argues that his trial counsel was deficient because (1) he failed to object to the jury being allowed to learn that Waymire's and Johnson's plea agreements required them to testify "truthfully," and (2) because he drew the jury's attention to, and "emphasize[d] that the terms of Mr. Waymire's and Mr. Johnson's plea agreements required them to testify 'truthfully.'" Appellant's Br. at 10. The State argues that representation was effective because defense counsel's trial strategy included discrediting the witnesses' testimony through use of the plea agreements. We agree with the State.

A. Standard of Review

Washington has adopted the *Strickland*[2] test to determine whether a defendant had constitutionally sufficient representation. *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The defendant must show both that counsel's performance was deficient and that the

[2] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

deficient performance prejudiced him. *Cienfuegos*, 144 Wn.2d at 226-27 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In other words, Nesbitt bears the burden of showing that, but for the deficient performance, there is a reasonable probability that the trial outcome would have differed. *Cienfuegos*, 144 Wn.2d at 227 (citing *Strickland v. Washington*, 466 U.S. at 694). The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

"Deficient performance is not shown by matters that go to trial strategy or tactics." *Cienfuegos*, 144 Wn.2d at 227 (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). We maintain a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

B. Plea Agreement

Nesbitt cites case law indicating that plea agreement terms, where they include requirements for the witness to testify truthfully or accurately at trial, are prejudicial as they improperly vouch for the witnesses' credibility. *See State v. Green*, 119 Wn. App. 15, 23, 79 P.3d 460 (2003); *see also State v. Jessup*, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982). The difference between these cases and his, is that here, introduction, questioning, and discussion about the "truthfulness" of the witnesses' statements, per the plea agreement, were an active part of, and helpful to, defense's strategy at trial.

Defense counsel, not the State, introduced the agreements into evidence. Counsel's express theory, was to show that the witnesses' had gotten a very good deal, but that to keep that

deal, they had to stick to their original stories, regardless of veracity. Counsel's apparent strategy was to demonstrate that each witness's original story told to detectives was not true, but to keep their plea agreements, they had to stick with what they had told detectives.

This strategy is clear through defense counsel's questioning of Waymire and Johnson. This exchange with Waymire, demonstrates this:

> Q. Now, we've already established that this is about what, nine months after the robbery. At this point you know that someone has talked.
> A. Yes.
> Q. Right? Because Detective Harker knows too much. Isn't that right?
> A. Yes.
> Q. So you decide that you have a choice to make. You could either go along with this story or you can deny it.
> A. Right.
> Q. And you decide to go along with this story.
> A. Yes.

RP at 342-43. Defense counsel engaged in a similar tactic with Johnson, questioning his original statement to police:

> Q. So a guy you have never met sitting in a room of a guy's house you've never met is going to call yet another guy you've never met and another guy that you barely know to go do this robbery; is that right?
> A. Yeah.

RP at 502.

After suggesting that the original stories the witnesses told police were untrue, defense counsel started questioning about the plea agreement terms. Counsel got Waymire to concede that he was testifying because he did not want to lose his deal. Counsel questioned Waymire further, suggesting that whether Waymire satisfied his agreement terms was largely in the State's discretion:

> Q. And you said that you and Bobby and Shawn Wells and Akeel Nesbitt did

> this robbery together; is that right?
> A. Yes, I did.
> Q. And if you deviate from that story today you lose the benefit of the deal; is that right?
> A. Yes.
> Q. I'd like to go down a little bit. Quote, "The defendant agrees that his or her statements provided to law enforcement and described in discovery are truthful and accurate."
>
> You've already agreed that what you told Detective Harker is the truth, so that's our measure. If you don't tell the truth you lose the benefit of the deal, and what you told Detective Harker is the truth. That's our measuring stick. Is that right?
> A. I guess, yes.
> Q. Okay. And I'm going to keep reading. "A deviation from those facts in future testimony would be a breach of the Plea Agreement."
>
> You have to testify to what you told Detective Harker.
> A. Yes.
> Q. And if you don't, the prosecutor can come back and tag you with the five and a half to six and a half years that we just talked about.
> A. That's correct.

RP at 373-74. Defense counsel used this same strategy when questioning Johnson.

Defense counsel's strategy is further clarified by his closing argument, where he suggests to the jury that Johnson began weaving a tale during police questioning because he thought Nesbitt had turned him in. Counsel argued to the jury that "[t]heir obligation [was] to tell the same story they told to Detective Harker" or risk losing their deal. RP at 931. Counsel then tied this theory directly to the "testify truthfully" language:

> I love the language in the Plea Agreement with Mr. Johnson. The defendant, Mr. Johnson, agrees that his statements provided to the prosecutor and law enforcement are truthful and accurate, and that he will testify consistently with them . . . If he deviates from [the agreement] then he loses his deal and he gets the 80 to 98 months that he's looking at.
>
> This is not a motivation to testify. It's a motivation to continue a lie. A lie that started [when first interviewed by police] and continues to this day.

RP at 931-32.

Introducing and using the plea agreement language was clearly a strategic and tactical move by defense counsel. We cannot say that it was an unreasonable one, either. Without physical evidence of Nesbitt's guilt, defense counsel did what he could to undermine the credibility of the State's cooperating witnesses. As previously noted, "[d]eficient performance is not shown by matters that go to trial strategy or tactics," and accordingly, we find Nesbitt's representation effective. *Cienfuegos*, 144 Wn.2d at 227 (quoting *Hendrickson*, 129 Wn.2d at 77-78).

II. Johnson's Motive

Nesbitt argues that the trial court erred by denying his motion to permit questioning on Johnson's motive to enter into the plea agreement because it violated his right to confront his accuser, as guaranteed by the United States and Washington Constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Nesbitt attempted on cross examination to question Johnson about his recent marriage and the impending birth of his child. The State objected and the trial court sustained the objection finding that the questions improperly appealed to the jury's sympathy and that the "probative value with respect to the issue of bias, if any, is substantially overweighed by the impermitted inference to be drawn from the examination and the responses." RP at 532. We find that the trial court's ruling was proper.

We generally review a trial court's decision to admit evidence for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Where the appellant claims a violation of the confrontation clause, however, we review the trial court's decision de novo.[3] *State v.*

Chambers, 134 Wn. App. 853, 858, 142 P.3d 668 (2006).

Both the federal and state constitutions guarantee the right to confront adverse witnesses. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Great latitude must be allowed in cross-examining a key prosecution witness, particularly an accomplice who has turned State's witness, to show motive for the testimony. *State v. Brooks*, 25 Wn. App. 550, 551, 611 P.2d 1274 (1980). The right of cross-examination allows more than asking general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The trial court, however, still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice. *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002).

Here, it was not improper for the trial court to limit further questioning about Johnson's recent marriage or the impending birth of his child.[4] During the course of cross-examination, defense counsel elicited testimony showing that Johnson was an admitted car thief, admitted robber (first degree), and questioned him extensively on the benefits he gained from the plea agreement with the State in exchange for his testimony. Defense counsel provided ample evidence of motive and bias and common sense dictates that anyone in prison would rather not be

[3] Though we state in *Chambers* that we review alleged violations of the confrontation clause de novo, other case law indicates that where we review the trial court's limitation of the scope of cross-examination, we review for abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). In this case, it does not matter, as Nesbitt cannot show prejudice from the trial court's actions, and so his claim fails.

[4] After Johnson briefly described the matter to the jury.

there.

Even if the trial court should have allowed the line of questioning, we still affirm Nesbitt's convictions. Violation of Nesbitt's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing that the error was harmless. *State v. Maupin*, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. We have no doubt that further questioning on Johnson's family life would not have resulted in a different outcome for Nesbitt. The jury was aware that Johnson was recently married and expecting a child. Further, they were aware of his past criminal history. Finally, the jury was aware that instead of serving 80 to 98 months in jail, Johnson's time would be reduced by two thirds, to 32 months in custody, in exchange for his testimony. Given what the jury heard about Johnson, its verdict would not have changed if Nesbitt had questioned Johnson further on his family situation.

III. Singer's Juvenile Record

Nesbitt assigns error to the trial court's denial of his request to introduce evidence at trial of Singer's prior juvenile third degree theft conviction. The State notes that admission of such evidence was at the trial court's discretion, and the trial court did not abuse its discretion in denying Nesbitt's request. We agree with the State.

We review the trial court's decision whether to admit evidence for manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); *State v. Hepton*, 113 Wn. App. 673, 687, 54 P.3d 233 (2002); *State v. Greathouse*, 113 Wn. App. 889, 918, 56 P.3d

569 (2002). Evidence of other crimes or misconduct must be logically relevant to a material issue before the jury, and the probative value must outweigh the prejudicial effect. *Greathouse*, 113 Wn. App. at 918.

Under evidence rule (ER) 609(d), evidence of juvenile convictions are "generally not admissible." The trial court can still allow evidence of a juvenile adjudication if it is "satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." ER 609(d). The trial court did not think the juvenile theft conviction fell into this exception and it is easy to see why. The trial court admitted evidence of Singer's more recent adult convictions, including making a false statement to police, second degree burglary, and second degree robbery. It is likely that in light of this, the trial court was not "satisfied" that the six-year old juvenile theft conviction was "necessary for a fair determination" on the issue of Nesbitt's guilt or innocence. There was no abuse of discretion, here.

Additionally, it is worth mentioning that again, Nesbitt cannot show that any error here was prejudicial. The jury heard about Singer's extensive recent criminal history and heard his testimony, which was remarkably inconsistent to that of the other witnesses. It was so inconsistent in fact, that the State notes in its briefing that it was basically "useless" to its case. Resp't's Br. at 28. The State did not even mention Singer in its closing statement, something that Nesbitt's counsel pointed out to the jury.

IV. Cumulative Error

Nesbitt argues that because of the multiple errors the trial court made, the cumulative error doctrine requires reversing his convictions giving him a new trial. Since all his claims of

error fail, there cannot be cumulative error.

V. Statement of Additional Grounds (SAG)[5] Issues

Nesbitt asserts two additional grounds for review in his SAG. Since neither makes sense, we cannot review them. The first claim states:

> Of any case of ineffectiveness in any trial court, it becomes a very [serious] issue. The judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. For scientific testimony/evidence to be admitted, it must be supported by appropriate validation, in other words, good grounds based on what is known. A conviction cannot rest on junk science. There are some argument of cases down below that reflect this.

SAG at 2. After this statement, Nesbitt lists 11 case citations—without elaboration.

Nesbitt's second claim states:

> In this trial court I found that it was ineffective of jury instructions and counsel. Down below are some cases that reflect this.

SAG at 4. Again, Nesbitt lists several case citations but does not elaborate further on his claim.

RAP 10.10 permits Nesbitt to file this separate SAG to make us aware of matters he believes his counsel has not adequately addressed in his brief. Though Nesbitt is not required to reference the record or make proper citations, he is required to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Because he does not do this, and we are not "obligated to search the record in support" of Nesbitt's claims, we decline further review of his SAG. RAP 10.10(c).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the

[5] RAP 10.10.

Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

I concur:

Van Deren, C.J.

Quinn-Brintnall, J. (concurring) — I concur with the majority's analysis and the result reached in this case. Clearly, defense counsel introduced the witnesses' plea agreements as a strategic maneuver to cast doubt on the credibility of their trial testimony. I write separately to note my concern that, under circumstances not present here, these agreements suggest that a witness must testify consistent with statements he or she previously made to police, regardless of the truth, in order to avoid breaching the plea agreement.

In my opinion, plea agreements that grant concessions in exchange for witness cooperation, like immunity agreements, may require that the witness testify truthfully at trial. Such bargains may not, however, expressly order that the witness testify in a particular way. The California Supreme Court succinctly stated what I believe is the rule:

> A prosecutor may grant immunity from prosecution to a witness on condition that he or she testify truthfully to the facts involved. But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and thus inadmissible. Such a strong compulsion may be created by a condition that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers.

People v. Boyer, 38 Cal. 4th 412, 455, 133 P.3d 581 (citations and internal quotation marks omitted) (alteration in original), *cert. denied*, 549 U.S. 1021 (2006); *see also People v. Garrison*, 47 Cal. 3d 746, 765 P.2d 419 (1989).

Here, the agreements in question require that the witnesses testify truthfully at Akeel Nesbitt's trial and we are not reviewing a witness's recantation or deciding whether a witness's testimony violated a plea agreement. Thus, the enforceability of the plea agreement issue is not before us on the merits. Accordingly, I concur.

Quinn-Brintnall, J.